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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959

No. 159

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner

v.

FEDERAL POWER COMMISSION, ET AL.,
Respondents

No. 173

THE UNITED GAS IMPROVEMENT COMPANY,
Petitioner

PHILADELPHIA ELECTRIC COMPANY,
Petitioner

v.

FEDERAL POWER COMMISSION, ET AL.,
Respondents

BRIEF AMICI CURIAE OF THE CITY OF PHILADELPHIA AND THE CITY OF PITTSBURG IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1959

No. 459

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner

v.

FEDERAL POWER COMMISSION, ET AL.,
Respondents

No. 473

THE UNITED GAS IMPROVEMENT COMPANY,
Petitioner

PHILADELPHIA ELECTRIC COMPANY,
Petitioner

v.

FEDERAL POWER COMMISSION, ET AL.,
Respondents

BRIEF AMICI CURIAE OF THE CITY OF PHILADELPHIA AND THE CITY OF PITTSBURG IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion of the United States Court of Appeals is not yet reported (See Decision printed in Public Service Commission of the State of New York Petition, Appendix A, and The United Gas Improvement Company and Philadelphia Electric Company Petition, Appendix A). The Opinion of the Federal Power Commission (R. 481-555) is reported at 20 FPC 264 (1958); the Commission's Order denying rehearing (R. 602-610) is reported at 20 FPC 571 (1958).

JURISDICTION

The asserted grounds for jurisdiction are set forth in the Petitions of the Public Service Commission of the State of New York and The United Gas Improvement Company and Philadelphia Electric Company.

QUESTIONS PRESENTED

The questions presented are set forth in the Petitions of the Public Service Commission of the State of New York and The United Gas Improvement Company and Philadelphia Electric Company.

STATUTES INVOLVED

The applicable provisions of the Natural Gas Act, 52 Stat. 821 (1938), as amended by 56 Stat. 83 (1942), 15 U. S. C. §717.717w, are printed in Appendix B of the Petition of the Public Service Commission of the State of New York and in Appendix B of the Petition of The United Gas Improvement Company and Philadelphia Electric Company.

INTEREST OF AMICI CURIAE

The City of Philadelphia represents in this proceeding 600,000 of its citizens who are consumers of gas. Over one-third of the gas used in Philadelphia is supplied by the Transcontinental Gas Pipe Line Corporation (*Transco*). It is these citizens who ultimately pay for the increased gas prices permitted by the decision below even though, in some future Section 5 proceeding, the increase may subsequently be found to have been unwarranted.

The City of Pittsburgh represents in this proceeding its 670,000 citizens, the majority of whom are consumers of

natural gas. Transcontinental Gas Pipe Line Corporation is a supplier of the Manufacturers Light and Heat Company, whose 253,000 customers in Pennsylvania include 22,400 residental accounts in the City of Pittsburgh itself. It is these consumers who will pay any rate increases which may result from an adverse ruling in the case at bar.

The prices approved by the Court below are 80% above Transco's average cost of purchased gas. These higher rates will trigger "favored nation" pricing clauses in other of Transco's gas purchase contracts and bring about increases aggregating $5,000,000 annually.

This Court declared that the purpose of the Natural Gas Act was to provide consumers with natural gas at the lowest possible reasonable rates.[1] The effect of the decision below is to saddle consumers with the highest possible rate the market will bear.

This Court viewed Section 7 as a bulwark against exploitation of the consumer.[2] The effect of the decision below is to strip Section 7 of all consumer safeguards.

The only effective means, under the Natural Gas Act, of controlling price increases is the conditioning of certificates as to price in Section 7 proceedings. Such was the holding in *CATCO*.[3] Therein this Court declared that unconditional certification should be refused "where the application on its face or on presentation of evidence *signals* the existence of a situation that *probably* would not be in the public interest."[4]

Especially did this Court demand the "most careful scrutiny"[5] of initial price proposals. And where, as here, the proposed contract price was higher than any previously

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[1] *Atlantic Refining Co. et al. v. Public Service Commission of the State of New York*, 360 U. S. 378, 388 (1959), hereafter referred to as "CATCO."

[2] 360 U. S. at 391.

[3] Ibid.

[4] 360 U. S. at 391 (emphasis supplied).

[5] 360 U. S. at 391.

paid, where, as here, there was no inquiry into the reasons why the proposed price rate exceeded prior prices, where, as here, there was no analysis of the relative costs of production, and where, as here, the evidence showed that certification at the proposed price would trigger increases in contracts containing "favored nation" clauses, this Court held that the Commission could not issue a permanent, unconditioned certificate.

Yet, the Court below has affirmed permanent certification absent any of the price analyses required by the *CATCO* decision. The decision below, coupled with the decision of the Commission, wherein the majority doubted their power under Section 7 to attach a price condition to a certificate, leaves consumers virtually defenseless against unwarranted price increases.

REASONS FOR GRANTING THE WRIT

I. The Importance of the Questions Presented to the Proper Administration of the Act Requires the Granting of Certiorari.

Certiorari should be granted in this case for all the reasons which dictated the grant of certiorari in *CATCO*.

Clarification and reaffirmation of the Commission's responsibility, in Section 7 proceedings, to analyze proposed price increases is vitally "important during this formative period when the ground rules of producer regulations are being evolved." [6] The opinion below is the first interpreting and applying this Court's *CATCO* decision. The Court below, and the Commission in subsequent cases,[7] have in-

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[6] 360 U. S. at 391.

[7] *The California Company*, Docket No. G-16108, *et al.*, August 10, 1959; *Sun Oil Company, et al.*, Docket No. G-15122, *et al.*, August 10, 1959; *Sunray Mid-Continent Oil Company*, Docket No. G-14753, August 10, 1959; *Superior Oil Company, et al.*, Docket No. G-16380, *et al.*, August 10, 1959; *Texas Gas Transmission Corp., et al.*, Docket No. G-17335, *et al.*, Opinion No. 327, issued August 10, 1959; *South Georgia Natural Gas Company, et al.*, Opinion No. 325, issued August 7, 1959.

terpreted the *CATCO* decision as requiring no change in Commission practice in Section 7 proceedings. The present decision approves the Commission's issuance of unconditioned certificates authorzing sales of natural gas at significantly increased prices without having given any greater consideration to those prices than that found to be insufficient in *CATCO*.

Thus, the decision below, in effect, ignores and nullifies the teachings of *CATCO*. If the Act is to be administered so as to "afford consumers a complete, permanent and effective bond of protection from the excessive rates and charges," this Court must grant certiorari.[8]

II. The Decision Below Is in Direct Conflict With the Catco Case.

This case is indistinguishable from *CATCO;* in every significant respect the records of the two cases are parallel.[9] In each case the Commission followed the same premises to reach the identical conclusions: (1) the opponents of certification have the burden of proof on the issue of price justification; (2) no cost evidence need be introduced, nor need detailed findings supporting price increases be made; and (3) in any event, the Commission's power to attach a price condition is doubtful.

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[8] 360 U. S. at 388.

[9] The only difference between *CATCO* and the instant case is that in *CATCO* there was no evidence of a need for the gas supplies, whereas in the present case such a finding was made. (The issue of need in *CATCO* was considered in a separate proceeding. Here, the Commission consolidated the pipeline and producer applications.)

This difference, however, is not material in view of the fact that in *CATCO* it was first determined that the evidence on the issue of price justification was insufficient to establish the public convenience and necessity before the question of whether the record supported a determination of need for the increased supply of gas was ever reached.

This Court in *CATCO* interpreted the Natural Gas Act as prohibiting the issuance of unconditional certificates "where the rate is not *clearly shown* to be required by the public convenience and necessity," [10] and placed the burden of justifying a rate increase upon the proponents of certification. The Court below affirmed the Commission's present decision which placed upon the opponents of unconditional certification the burden of showing that a price condition was required.

This Court, in *CATCO*, remanded the cause to the Commission because there was insufficient evidence to support the finding of public convenience and necessity which is required for the issuance of permanent certificates.[11] The Court below affirmed the Commission's present decision upon a record devoid of cost of production data.

This Court, in *CATCO*, viewed as "surprising" the Commission's failure to explain why the proposed price was 70% higher than the weighted average cost of gas to the pipeline company.[12] The Court below affirmed the Commission's decision which made no effort to investigate and explain why the proposed price was 80% higher than Transco's average cost of gas purchases.

This Court, in *CATCO*, found to be even "more damaging" evidence that the purchase price to the pipeline company was greatly in excess of any price previously paid in the area by the company.[13] The Court below affirmed the present issuance of certificates for purchases at prices six cents higher than any previously paid in the area by Transco.

This Court, in *CATCO*, remanded the cause where the evidence failed to support a finding that certification of a price would not trigger increases in leases with "favored nation" clauses resulting in price spirals.[14] The Court be-

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[10] 360 U. S. at 392. (emphasis supplied).
[11] 360 U. S. at 392-93.
[12] 360 U. S. at 393.
[13] Ibid.
[14] Ibid.

low affirmed the Commission's present decision approving Transco's purchase of gas at a rate which will activate such clauses in existing contracts and result in price increases of $5,000,000 a year.

This Court, in *CATCO*, held that the Commission has the power to attach price conditions where the proposed price "is out of line" or "its approval might result in a triggering of general price rises" or there might be "an increase in the applicant's existing rates." [15] The Court below affirmed the "balancing of the weight be given the various factors" by a Commission which doubted its power to attach price conditions.

The clear and direct conflict between *CATCO* and the present case requires the issuance of a writ of certiorari to correct the patent error of the Court below.

Conclusion

For the foregoing reasons, it is respectfully urged that the Petitions for a Writ of Certiorari be granted.

Respectfully submitted,

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[15] 360 U. S. at 391.